

## THE STATE OF NEW HAMPSHIRE

### SUPREME COURT

**In Case No. 2004-0739, State of New Hampshire v. Robert Bartlett, the court on April 21, 2006, issued the following order:**

Following a jury trial, the defendant, Robert Bartlett, was convicted of misdemeanor simple assault and two counts of felonious sexual assault. On appeal, he contends that the trial court erred in denying his motions to dismiss when the State was culpably negligent in failing to preserve physical evidence. We affirm.

In this case, the defendant argues that the State was negligent in failing to preserve the rug located in the room where the assaults occurred. We will assume without deciding that the State had a duty to preserve the rug even though it was never in its possession and no motion to preserve it was filed by the defendant. See State v. Murray, 129 N.H. 645, 647 (1987) (court has not yet had occasion to determine constitutional significance of destruction of evidence by a third party); State v. Michaud, 146 N.H. 29, 32 (2001) (addressing sanction to be imposed after State found culpably negligent in destruction of evidence that had been subject of motion to preserve).

We turn then to the issue of whether the State was culpably negligent in failing to preserve the rug. The defendant argues that the trial court erred by placing the burden upon him to establish the culpable negligence. The trial court's order correctly stated that the State bore the burden of establishing that it did not act with culpable negligence. The order continued on, however, to find that "the defendant did not establish that the State was culpably negligent in failing to preserve the rug for testing." Even if we assume that the trial court erred in applying the standard after correctly stating it, we need not remand for further proceedings or clarification as we conclude upon the record before us that no reasonable person could have found culpable negligence. See State v. Giordano, 138 N.H. 90, 95 (1993) ("Culpable negligence is something more than ordinary negligence, mere neglect, or the failure to use ordinary care - - it is negligence that is censorious, faulty or blamable.").

The trial court found that the State had no clear evidence that the rug was actually stained; this finding is supported by the record. Given this finding, the lack of any motion to preserve and the fact that the State never had possession of the rug, no reasonable person could find that the State acted in a censorious, faulty or blamable manner.

Affirmed.

DALIANIS, GALWAY and HICKS, JJ., concurred.

**Eileen Fox**  
**Clerk**